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24 WARDELL STEPHEN CURRY II

25 **UNITED STATES DISTRICT COURT**

26 **NORTHERN DISTRICT OF CALIFORNIA**

27 ATHALONZ, LLC

28 Plaintiff,

v.

UNDER ARMOUR, INC.

Defendant.

Case No. 3:23-mc-80324-LJC

**NON-PARTY WARDELL STEPHEN  
CURRY II'S REPLY IN SUPPORT OF  
HIS MOTION TO QUASH PLAINTIFF'S  
SUBPOENA**

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**TABLE OF CONTENTS**

I. INTRODUCTION .....	1
II. THE ACCUSED FEATURES OF THE CURRY PRODUCTS.....	1
III. CURRY DOES NOT UNIQUELY POSSESS ANY RELEVANT INFORMATION .....	2
IV. UNDER ARMOUR HAS IDENTIFIED THE RELEVANT WITNESSES AND PRODUCED THE RELEVANT DOCUMENTS .....	7
V. THE SUBPOENA IMPOSES AN UNDUE BURDEN.....	8
VI. THE SUBPOENA FAILS TO PROVIDE A REASONABLE TIME TO COMPLY.....	9
VII. CONCLUSION .....	10

## TABLE OF AUTHORITIES

Page(s)

## Cases

<i>Amini Innovation Corp. v. McFerran Home Furnishings, Inc.</i> , 300 F.R.D. 406 (C.D. Cal. 2014) .....	5, 6, 7
<i>Avaya Inc. v. Pearce</i> , No. 19-cv-00565-SI, 2021 U.S. Dist. LEXIS 56013 (N.D. Cal. Mar. 24, 2021).....	9
<i>Bonzani v. Shinseki</i> , No. 2:11-cv-00007-EFB, 2014 U.S. Dist. LEXIS 77619 (E.D. Cal. June 4, 2014) .....	10
<i>Free Stream Media Corp. v. Alphonso Inc.</i> , No. 8:17-mc-00011, 2017 U.S. Dist. LEXIS 235015 (C.D. Cal. May 4, 2017).....	8, 10
<i>Genus Lifesciences Inc. v. Lannett Co.</i> , No. 18-cv-07603-WHO, 2019 U.S. Dist. LEXIS 222550 (N.D. Cal. Dec. 30, 2019) .....	9
<i>Staley v. Gilead Scis., Inc.</i> , No. 19-CV-02573-EMC (LB), 2022 U.S. Dist. LEXIS 45194 (N.D. Cal. Mar. 14, 2022) .....	5
<i>Under Armour, Inc. v. Battle Fashions</i> , No. 18-mc-80117-LB, 2018 U.S. Dist. LEXIS 130983 (N.D. Cal. Aug. 3, 2018) .....	6, 8, 9
<i>Universal Church, Inc. v. Standard Constr. Co. of S.F., Inc.</i> , No. 14-cv-04568-RS (KAW), 2015 U.S. Dist. LEXIS 143382 (N.D. Cal. Oct. 21, 2015) .....	10

## Statutes

35 U.S.C. § 284.....	4
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**I. INTRODUCTION**

Athalonz has not, and cannot, establish that Curry’s testimony or documents are relevant to this case. Rather, as explained in detail in the Opening Motion, and below, the discovery sought by this Subpoena is irrelevant, unreasonable, duplicative, harassing, and available from other sources that are more convenient, *i.e.* Under Armour, the party to the litigation. The Subpoena also includes facially overbroad requests, many of which are not relevant to the issues in this litigation, and Athalonz has failed to demonstrate that the requested documents are not also in the possession of Under Armour.

Likewise, the deposition Athalonz seeks of Curry is improper. There is nothing relevant to this litigation that Curry could tell Athalonz that Under Armour’s witnesses cannot provide. Curry lacks unique personal knowledge of any material facts in the underlying action, including facts relating to the allegedly infringing design of the Accused Curry Products. The burden to Curry of disrupting his demanding schedule to prepare for and attend a deposition on patent infringement issues of which he has no knowledge is unjustified, as any information that Curry possess about the Accused Curry Products is more readily and properly obtained directly from Under Armour—the company actually engaged in designing, developing, advertising, selling and accounting for the products at issue. The Subpoena also demands production of documents within an unreasonable time frame. For these reasons and the reasons set forth below, the Court should grant Curry’s motion to quash.

**II. THE ACCUSED FEATURES OF THE CURRY PRODUCTS**

Athalonz cannot plausibly argue that the accused features of the accused products are anything other than the shape and materials of the accused shoe’s sole. Opp., 2-3. The Asserted Patents repeatedly and consistently refer to the sole design and materials as the allegedly inventive features. The entire specification is directed to the allegedly novel “athletic positioning” design of a shoe’s sole, and not once do any of the asserted claims describe any other potentially novel feature. *See, e.g.,* Opp., Ex. B. Claim 1 of the ‘291 patent cited in the Opposition is demonstrative, as the only component claimed aside from the design features of the sole (which includes the midsole, insole and outsole) is a generic “upper”—a feature

common to all shoes—which Athalonz does not suggest is remotely relevant to patentability. Opp., 3. The dependent claims of the ‘291 patent all describe additional aspects of the shoe’s sole, including additional heights and slopes that define its precise shape and dimensions. Opp., Ex. B, claims 2-8. The other four Asserted Patents are similar, wherein nothing more than a generic “upper” is claimed in addition to the allegedly novel design features of the shoe’s sole, including the sole’s shape and compressibility of the materials it is made from, as is demonstrated by the representative claims identified in Athalonz Opposition. Opp., 3 (citing U.S. Patent Nos. 10,674,786 claim 5; 11,064,760 claim 1; 11,510,456 claim 1; and 11,375,768 claim 1).

Likewise, in its Complaint against Under Armour, Athalonz described its “patented technology” as the “three-dimensional sloped shape and compressibility” of the shoe’s sole. Ex. 1, ¶ 15. Athalonz then continued to describe its “technology” as being exclusively directed to the shape or materials used in the allegedly novel shoe’s sole (*id.*, ¶¶ 16-24), and even compared the Athalonz midsole design with flat midsoles and U-shaped midsoles found in most athletic shoes, as shown in the diagram below. *Id.*, ¶ 23.

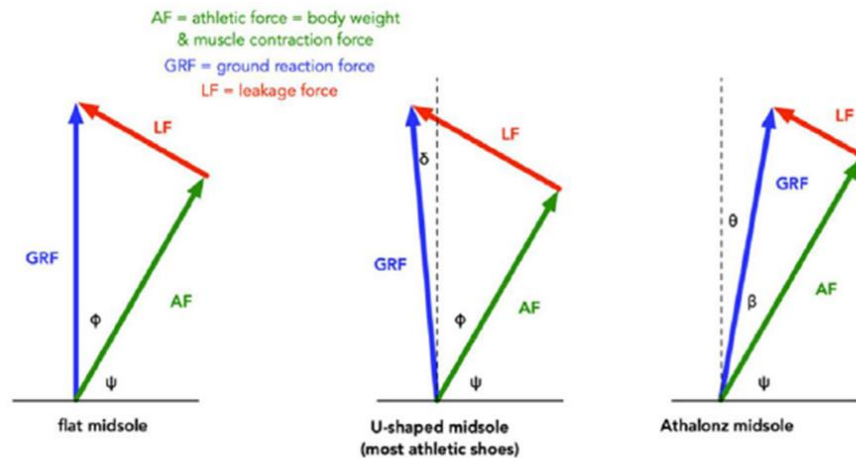


Figure 8. Comparison of the various forces at play when an athlete wears a flat midsole, U-shaped midsole, or an Athalonz developed midsole.

### III. CURRY DOES NOT UNIQUELY POSSESS ANY RELEVANT INFORMATION

Athalonz’s citation to various high-level descriptions of the role Curry plays with respect to the design of the Accused Curry Products in Exhibits C-H of the Opposition (Opp., 4) fails to demonstrate that he is a witness in possession of relevant, non-cumulative information. None of

1 the articles or press releases cited by Athalonz suggest that Curry had any involvement in  
 2 designing, developing or testing the soles of the Curry products—the only accused feature of the  
 3 products at issue—and none contradict the sworn statements of Mr. Curry’s agent, William J.  
 4 Austin, and Ryan Drew, Vice-President of the Curry Brand at Under Armor, that demonstrate  
 5 Curry’s lack of unique, relevant information.

6 For example, Mr. Austin explained that Curry “does not design or develop the shape of  
 7 the soles of the SC line of shoes, nor determine what materials are used in the soles” and that  
 8 “Under Armour proposes, designs [and] develops ... all SC products” and “oversees and  
 9 manages the advertising and production of the SC line of products.” Dkt 1-2, ¶¶ 3-4.

10 Likewise, Mr. Drew explained that it is Under Armour—not Curry—that “designs,  
 11 develops, [and] promotes ... the Under Armour products that are part of the Curry brand;” that  
 12 “Curry does not design the shape of the sole, or any other component, of the accused Curry  
 13 products;” and that “Curry does not choose the materials used in the sole, or any other  
 14 component, of the accused Curry products.” Dkt. 1-3, ¶¶ 4-6.

15 Despite numerous unfounded allegations regarding the veracity of the declarations,  
 16 Athalonz cannot demonstrate that Mr. Austin’s and Mr. Drew’s statements are false. Rather,  
 17 both declarants consistently and conclusively support Curry’s lack of involvement with the  
 18 accused features of the Curry products.<sup>1</sup> The fact that Under Armour and Curry have a  
 19 partnership, that Curry owns stock in Under Armour and that Curry was named President of the  
 20 Curry product line (Opp., 5) does not alter the fact that he is uninvolved in the critical question of  
 21 whether the Accused Curry Products infringe the Asserted Patents, or the calculation of any  
 22 potential damages associated with the alleged infringement. Motion, 8.

23 Athalonz’s suggestion that Curry possesses relevant insight into the value of the  
 24

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25  
 26 <sup>1</sup> Athalonz suggestion that the Austin and Drew declarations should be ignored because they  
 27 allegedly lacked knowledge as to what the “accused features” are, as shown in Athalonz’s patent  
 28 and infringement contentions (Opp., 12), is unsupported as neither declarant ever refers to the  
 “accused features” in his declaration. Rather, both expressly refer to the shape and materials of  
 the Curry shoe soles.

1 particular features of the Curry products, including “relevant insight into the value of the injury  
 2 prevention aspects of the Accused Curry products” is unsupported and irrelevant. The only  
 3 relevant design features of the products are those covered by the Asserted Patents, *i.e.* the shape  
 4 and compressibility of the materials used in the sole, for which the motion demonstrates Curry  
 5 lacks knowledge. Motion, 7-9. While Curry does wear at least some of the Accused Curry  
 6 Products, Athalonz’s suggestion that he could somehow be able to opine on “how and why the  
 7 Accused Curry Products have been commercially successful, and what benefits the accused  
 8 features in the Accused Curry Products bring customers” (Opp., 8-9) is unsupported as any such  
 9 testimony would be entirely speculative. The same logic applies to Curry’s supposed ability to  
 10 “discern which features of the shoes specifically speak to the benefits and value of the invention”  
 11 (Opp., 9),<sup>2</sup> as Curry has already stated that he is “not responsible for assessing the value or  
 12 benefits of the Accused Curry Products” (Opp., Ex. P, pp. 8-9) and lacks knowledge with respect  
 13 to the comparative value or benefits of the accused products compared to other shoes. Motion, 9.  
 14 Any alleged insight that Curry could provide regarding the products’ impact on his “personal  
 15 professional basketball experience” (*id.*) is irrelevant to damages, as what one professional  
 16 athlete believes about a product is completely untethered to Athalonz’s ability to demonstrate  
 17 commercial success or demand for the product. And Athalonz’s suggestion that Curry has any  
 18 insight into the “long-felt unsolved needs and failure of others” or the level skill of a POSITA  
 19 (Opp., 9-10) is again speculation unsupported by the facts of the case, where Curry has  
 20 demonstrated that he lacks knowledge of, and involvement with, the allegedly novel aspects of  
 21 the accused shoes.

22 While Athalonz’s makes much of Judge Gilstrap’s Order suggesting that another of  
 23 Under Armour’s sponsored athletes, Jordan Spieth, may have relevant information based on an

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24  
 25 <sup>2</sup> 35 U.S.C. § 284 states that the relevant framework for calculating damages is “the use made of  
 26 the invention by the infringer,” not how any particular user feels about or values various aspects  
 27 of the accused products. Thus, Athalonz’s suggestion that Curry has “unique” and relevant  
 28 testimony regarding the alleged value or benefits of the patented invention is wrong. The same  
 could be said about each of Under Armour’s customers, and that doesn’t give Athalonz the right  
 to subpoena them, or Curry, for testimony on this point.

1 Under Armour article posted on his website (Opp., 11), he too lacks relevant unique knowledge  
2 of the accused features of the accused Spieth products, and thus a similarly improper target of  
3 Athalonz's subpoenas. Judge Gilstrap's decision about Spieth's relevance was based on an  
4 incomplete record (and discovery there will show his assumption was incorrect); but here, the  
5 record contains declarations demonstrating that Curry had no involvement in designing,  
6 developing or testing the soles of the Curry products. And Athalonz's suggestion that Curry is  
7 somehow an "owner," officer" or "director" of Under Armour under Maryland law based on his  
8 ownership of Under Armour stock or his role with the Curry Brand (Opp., 13) is unfounded, and  
9 Athalonz cannot show that either of these facts somehow makes Curry's testimony any more  
10 relevant.

11 Notably, Athalonz has cited but a single case to suggest that the motion to quash should  
12 denied based on the relevance of the witness and/or undue burden, *Staley* (Opp., 11), and it is  
13 easily distinguishable. In *Staley*, a subpoena was issued to Dr. Cogan, a former board member of  
14 defendant Gilead, for whom the Court found that "there is no dispute ... was involved in  
15 decisions relevant to the litigation." *Staley v. Gilead Scis., Inc.*, 2022 U.S. Dist. LEXIS 45194, at  
16 \*10 (N.D. Cal. Mar. 14, 2022). There, Dr. Cogan's only argument regarding undue burden was  
17 that "plaintiffs have not demonstrated that 'he has relevant, nonprivileged information,'" and that  
18 he is a "busy person." *Id.* \*9. In stark contrast, Curry has expressly demonstrated that he lacks  
19 relevant knowledge regarding the design and development of the accused features of the Curry  
20 products, and is an extremely busy international celebrity and star basketball player in the midst  
21 of the NBA season, making the subpoena extremely burdensome.

22 Athalonz also fails to meaningfully distinguish the *Battle Fashions* and *Amini Innovation*  
23 cases that squarely support the quashing of this subpoena. Although Athalonz urges that the  
24 *Battle Fashions* case "is nothing like the litigation here," (Opp., 13) the facts in *Battle Fashions*  
25 mirror those here. In *Battle*, like here, Curry was subpoenaed by a Plaintiff who had brought suit  
26 against Under Armour alleging infringement by Under Armour's Curry Brand products. Much  
27 like Athalonz, the Plaintiff in *Battle* argued that Curry possessed unique information regarding  
28 the "importance" of the mark to Curry's brand, and information relevant to damages, *i.e.* the



1 proper amount of profits to disgorge and what the lost royalty measurement should be. *Under*  
2 *Armour, Inc. v. Battle Fashions*, No. 18-mc-80117-LB, 2018 U.S. Dist. LEXIS 130983, at \*10  
3 (N.D. Cal. Aug. 3, 2018). But the Court found that Mr. Curry’s view on these issues was  
4 irrelevant, as was Mr. Curry’s own personal view of whether the mark was descriptive. *Id.* Like  
5 here, the plaintiff in *Battle* also argued that the subpoena was justified because “Mr. Curry is  
6 involved in the design of Under Armour products.” *Id.* But the Court held that “discovery about  
7 Mr. Curry’s involvement in the design of Under Armour products is at best of marginal  
8 relevance.... In the end, Under Armour is the one that is selling whatever products that Mr.  
9 Curry may or may not have designed, and it is Under Armour against whom Mr. Battle is  
10 litigating his trademark dispute.” *Id.* Finally, like here, the plaintiff in *Battle* asserted that Mr.  
11 Curry’s testimony was relevant because he “is personally involved in marketing and promoting  
12 Under Armour products and has a contract with Under Armour to do so.” *Id.* Again, the court  
13 held that Curry’s involvement in promoting the Curry Products was not a reason to justify his  
14 subpoena, and suggested that the contract between Curry and Under Armour was unimportant as  
15 the plaintiff failed to show it related to the use of the mark at issue, (*id.*) just like Athalonz fails  
16 to show that the Under Armour-Curry sponsorship contract is related to the accused features of  
17 the Curry products. And Athalonz’s suggestion that “this litigation is specifically about the  
18 marketing and promotion of the Accused Curry Products” (Opp., 13) is simply untrue. This is  
19 not a case about marketing or promotion of products, but rather a patent infringement case that  
20 centers on whether the soles of Under Armour’s Accused Curry Products have certain features  
21 that infringe Athalonz’s patents.

22 Athalonz’s attempt to distinguish *Amini Innovations* similarly fails. Like here, Plaintiff,  
23 Amini, subpoenaed a celebrity, actress Jane Seymour, who allegedly “co-designed” a product  
24 that she promoted in advertisements and on her website that Amini alleged infringed its protected  
25 trade dress. *Amini Innovation Corp. v. McFerran Home Furnishings, Inc.*, 300 F.R.D. 406, 408  
26 (C.D. Cal. 2014). In granting the motion to quash, the Court determined that the plaintiff failed  
27 to show that Seymour was likely to possess information relevant to the specialized topics at issue  
28 in a trade dress case, *i.e.* the design’s functionality, secondary meaning and likelihood of

1 confusion (*id.*, at 412), in a similar way that Curry lacks knowledge pertaining to the level of  
 2 skill in the art, long felt need, or the failure of others. Opp., 9-10. Rather, like Curry, any  
 3 testimony Seymour could provide, “such as what the design actually is ... and how it is  
 4 presented to and received by the public” is “marginal to the issues in the action” and even if  
 5 relevant, “the information that Seymour [or Curry] might be expected to possess about [their]  
 6 role in that process ... is not necessarily unique to [them].” *Amini*, 300 F.R.D. at 412.

7 **IV. UNDER ARMOUR HAS IDENTIFIED THE RELEVANT WITNESSES AND**  
 8 **PRODUCED THE RELEVANT DOCUMENTS**

9 Athalonz fails to address that Under Armour has identified multiple witnesses that  
 10 possess knowledge of the relevant issues which have not yet been deposed, and that Under  
 11 Armour has already agreed to produce, and/or has produced, any relevant and responsive  
 12 documents, including: all design and technical documents for the accused products; all  
 13 development documents for the accused products; all promotional documents for the accused  
 14 products; all testing documents for accused products; sales and profit data for accused products;  
 15 and all documents related to Curry’s involvement in the design, development, or testing of the  
 16 accused features of the accused products. Motion at 1, 4-5. These categories include at least the  
 17 documents sought in Requests 3-5, and 8, and Curry has already responded that he is unaware of  
 18 any responsive documents for Requests 1 and 2. Regarding Requests 6 and 7, Curry explained  
 19 that he is “not responsible for assessing the value or benefits of the Accused Curry Products,  
 20 particularly as compared to other Under Armour basketball shoes or other basketball shoes  
 21 available on the market” and “not responsible for assessing the market for basketball shoes in the  
 22 United States.” Opp., Ex. P, pp. 8-9.

23 Athalonz also ignores the fact that Curry has already stated that he lacks knowledge with  
 24 respect to Request Nos. 3-8 generally, including (1) the marketing, advertising and promotion of  
 25 the accused products; (2) the comparative value or benefits of the accused products compared to  
 26 other shoes; (3) the market for basketball shoes generally; and (4) Under Armour’s pricing,  
 27 margins, costs, sales strategies, or sales comparisons. Motion, 9. And for all Requests (Nos. 1-  
 28 10), Curry has explained that “[a]ny non-privileged documents responsive to this Request would

be in Under Armour's possession; therefore, discovery should be requested from Under Armour, the proper party, not non-party Curry." Opp., Ex. P, pp. 5-11.

The irrelevant documents that Under Armour has not agreed to produce, *e.g.* the sponsorship agreement(s) between Curry and Under Armour that fall within the scope of Request Nos. 5 and 9,<sup>3</sup> are also the subject of a motion to compel, (Opp., 5) so if the Court deems that these documents are somehow relevant, Under Armour will produce them. Furthermore, Athalonz's suggestion that Under Armour has wrongfully limited its production to only produce documents related to Curry's role relating to the "accused features of the accused products" (Opp. at 5) is incorrect. In fact, "Under Armour ... previously agreed to produce all technical drawings, internal specifications, business plans, marketing plans, promotional materials, development documents and testing documents for the Accused Products. ... By nature, these agreed categories include any sponsored athlete's involvement in said design, development, testing, marketing, advertising or promotion." Ex. 12, Response to Motion to Compel, p. 4. Furthermore, this scope of production exceeds that required in the Eastern District of Texas, which limits production to documents relating to the accused features of the products at issue. *Id.*, pp. 3-4.

#### V. THE SUBPOENA IMPOSES AN UNDUE BURDEN

Athalonz's attempts to downplay the burden of forcing Curry to sit for a deposition fail. Athalonz's comparison of Mr. Curry's schedule to most people's five-day workweek (Opp., 15) is unreasonable. And as Curry has explained, his current in-season schedule includes much more than just games. Motion, 11. Furthermore, Curry has not suggested that it is only during the NBA season that a deposition would be burdensome. Opp., 15. Rather, Curry identified several obligations, including training, team obligations, endorsement, sponsorship and charity

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<sup>3</sup> See *Battle Fashions*, 2018 U.S. Dist. LEXIS 130983, at \*12 (denying production of Curry-Under Armour contract as irrelevant to trademark dispute); *Free Stream Media Corp. v. Alphonso Inc.*, No. 8:17-mc-00011, 2017 U.S. Dist. LEXIS 235015, at \*10 (C.D. Cal. May 4, 2017) (denying production of "any and all agreements, regardless of whether they are related to the accused products," holding that even if they are "tangentially relevant," the third-party should not bear the burden of discovery).

commitments, which run all year. Motion 11; *see also Battle Fashions*, 2018 U.S. Dist. LEXIS 130983, at \*9-12 (quashing subpoena to Curry served during the NBA offseason).

Athalonz also fails to address the overbroad nature of its document requests, including Requests No. 5 and 9 which are unrelated to the products accused of infringement and for which Athalonz has failed to provide any legal authority in support of their production. Motion, 12. Athalonz also does not address the fact that none of the requests are limited in time, and that Request No. 2 seeking all documents relating to a party in the underlying action, are facially overbroad. *Id.* Here, as in *Battle Fashions* and *Amini*, the Court should consider the overbreadth of the subpoena due to the burden it places on Curry compared to the likely value of the discovery sought. Motion, 12-13.

Finally, Athalonz's suggestion that Curry should somehow be obligated to produce documents that are also in Under Armour's possession because Curry shares counsel with Under Armour or has an organization at his disposal to "manage his off-court business profile" (Opp., 17) directly contradicts the longstanding precedent in this District which holds that documents should be obtained from the party, and not from a non-party, whenever possible. *See Genus Lifesciences Inc. v. Lannett Co.*, No. 18-cv-07603-WHO, 2019 U.S. Dist. LEXIS 222550, at \*10-11 (N.D. Cal. Dec. 30, 2019); *Avaya Inc. v. Pearce*, No. 19-cv-00565-SI, 2021 U.S. Dist. LEXIS 56013, at \*3 (N.D. Cal. Mar. 24, 2021); *Battle Fashions*, 2018 U.S. Dist. LEXIS 130983, at \*9.

## **VI. THE SUBPOENA FAILS TO PROVIDE A REASONABLE TIME TO COMPLY**

Athalonz fails to show that the seven business days it provided Curry was a reasonable time to respond. While Athalonz tries to twist the facts to suggest that Curry was somehow provided with 2 weeks to respond based on it emailing a copy of the subpoena to Curry's counsel *before* they represented him (Opp., 18), it cites no caselaw suggesting that this practice is adequate. Likewise, the cases Athalonz cite in its Opposition support Curry, not Athalonz, as none suggest that a subpoena with as short a response time as Athalonz provided to be reasonable. Rather, the subpoenas in *Universal Church* and *Bonzani* (Opp., 18) provided response times of 11 days and 14 days, respectively. *See Universal Church, Inc. v. Standard Constr. Co. of S.F., Inc.*, No. 14-cv-04568-RS (KAW), 2015 U.S. Dist. LEXIS 143382, at \*8

(N.D. Cal. Oct. 21, 2015); *Bonzani v. Shinseki*, No. 2:11-cv-00007-EFB, 2014 U.S. Dist. LEXIS 77619, at \*12 (E.D. Cal. June 4, 2014). Athalonz also fails to explain why their response period of less than 10 days—the amount of time the *Free Stream* Court deemed “presumptively unreasonable”—should be permitted, and fails to address the *Natera* decision which held that nine business days was insufficient. Motion, 14.

**VII. CONCLUSION**

For the foregoing reasons and those in Curry’s opening Motion, Curry respectfully requests that the Court grant this Motion and quash the Subpoena.

Dated: January 22, 2024

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